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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 183

B. H. INNESS BROWN, DAVID PAINE, ETHELBERT WARFIELD, ET AL., PETITIONERS

v.

JOHN GERDES AND JAMES D. CARPENTER, JR., TRUSTEES OF REYNOLDS INVESTING CO., INC., DEBTOR

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

This controversy, which comes here from the Court of Appeals of the State of New York, arose in the course of the administration of the assets of the Reynolds Investing Company, Inc., a debtor in a proceeding for corporate reorganization under the Bankruptcy Act pending in the United States District Court for the District of New Jersey. Because of the substantial public investor interest in the debtor, the Securities and Exchange Commission has participated in the federal reorganization proceeding upon the re-

quest of the United States District Judge pursuant to Sec. 208 of Chapter X of the Bankruptcy Act (11 U. S. C. 608). In the proceedings before the New York Court of Appeals, the Commission filed a brief *amicus curiae* pursuant to permission granted by that Court. This brief is submitted by the Securities and Exchange Commission as *amicus curiae* in support of the respondents.

OPINIONS BELOW

The opinions of the Special Terms of the New York Supreme Court (R. 98, 109) were not officially reported, but one of the opinions (R. 98) has been published in 33 N. Y. Supp. (2d) 949. The Appellate Division, First Department, affirmed without opinion (264 App. Div. 852; R. 118–119). The opinion of the New York Court of Appeals (R. 124–129), reversing the Special Term and the Appellate Division, is reported in 290 N. Y. 468.

JURISDICTION

The judgment of the New York Court of Appeals was entered April 22, 1943 (R. 129–130). A motion for reargument was denied on May 27, 1943 (R. 130–131). A petition for a writ of certiorari was filed July 20, 1943, and granted October 11, 1943 (R. 132). Jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code (28 U. S. C. 344 (b)).

QUESTION PRESENTED

The United States District Court in a proceeding for reorganization under the Bankruptcy Act appointed attorneys, who represented the principal security holders' committees in the proceeding, to institute suits in the state courts of New York against former officers of the debtor on causes of action in favor of the debtor's estate.

The principal question is whether the attorneys were entitled to have their fees for conducting the state court litigation fixed by the state courts under Sec. 475 of the New York Judiciary Law, or whether they must look to the reorganization court for their fees.

STATUTES INVOLVED

The pertinent provisions of statutes involved in this case are set forth in the Appendix, *infra*, pp. 37–46.

STATEMENT

Despite differences between the statements of facts in the briefs of petitioners and respondents, it is believed that those statements together form a sufficient factual basis for an understanding of the Commission's views; accordingly, the facts will not be restated. The petitioners will be referred to herein as the Attorneys and the respondents as the Trustees.

SUMMARY OF ARGUMENT

Under Chapter X of the Bankruptcy Act, Congress has preempted for the federal reorganiza-

tion courts broad power to supervise and fix administrative costs and expenses and to award reasonable compensation for services rendered in reorganization proceedings (U. S. Const., Art. I, Sec. 8, clause 4; Bankruptcy Act, Secs. 62d, 216 (3), 221 (4), 241–50; 11 U. S. C. 102 (d), 616 (3), 621 (4), 641–50). Such compensation includes the fees of attorneys appointed by the reorganization court to collect assets for the estate by pursuing causes of action in other courts. *Watkins* v. *Sedberry,* 261 U. S. 571; *W. J. Davidson & Co.* v. *Friedman,* 140 Fed. 853 (C. C. A. 6, 1906). When a state court undertakes to fix the fees of attorneys appointed by a reorganization court, the result is a clear conflict with the congressional intention to give the federal reorganization courts complete control over the proceeding for the protection of public investors.

In this case the reorganization court did not surrender its power to fix the Attorneys' fees. The plan of reorganization, the order of confirmation and the acts of the reorganization court and the Trustees clearly manifested a determination on the part of the court to retain exclusive jurisdiction over those fees. The cases relied upon by the Attorneys to show an implied relinquishment of the reorganization court's control over their fees (*Sherman* v. *Buckley,* 119 F. (2d) 280 (C. C. A. 2, 1941), certiorari denied, 314 U. S. 657; *In re Cup Craft Paper Corporation,* 40 F. Supp. 927 (S. D. N. Y., 1941), affirmed *sub nom.*

New York Credit Men's Assn. v. *Schlesinger*, 126 F. (2d) 472 (C. C. A. 2)) concern attorneys who had been retained by bankrupts prior to the institution of bankruptcy proceedings and whose statutory liens had attached prior to the proceedings, and are thus clearly distinguishable from the instant case wherein the Attorneys were initially appointed by the reorganization court.

Properly construed, Section 475 of the New York Judiciary Law does not purport to regulate the fees of attorneys appointed by a federal reorganization court. The Attorneys were officers of the reorganization court and by their appointment impliedly agreed, and became bound, to look to that court alone for their compensation.

The decision of the New York Court of Appeals correctly held that the Attorneys should be remitted to the reorganization court for the determination and allowance of their fees, and that decision should be affirmed by this Court.

ARGUMENT

I

ALLOWANCE OF COMPENSATION TO ATTORNEYS APPOINTED IN A REORGANIZATION PROCEEDING UNDER THE BANKRUPTCY ACT TO PROSECUTE CAUSES OF ACTION ON BEHALF OF THE ESTATE IS AN ADMINISTRATIVE MATTER EXCLUSIVELY WITHIN THE JURISDICTION OF THE UNITED STATES DISTRICT COURT ENTERTAINING THE PROCEEDING

The question whether attorneys appointed by a federal reorganization court to prosecute causes

of action on behalf of the debtor's estate may have the value of their services to the estate fixed by state courts must be determined by considering whether Congress, in the reorganization provisions of the Bankruptcy Act, has exercised its paramount bankruptcy power in a manner precluding resort to state procedures for the allowance of fees to attorneys who conduct litigation in the state courts. Constitution of the United States, Art. I, Sec. 8, clause 4. See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483; *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 344; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 739. It is our view that in its comprehensive system of bankruptcy administration Congress has preempted for the federal reorganization courts the power to supervise costs and expenses and to award reasonable compensation for services rendered in reorganization proceedings.

The power of reorganization courts over fees of persons rendering services to debtors' estates in reorganization is an essential element of the entire bankruptcy system. It gives the bankruptcy court control over one of the most important aspects of the proceeding—the maintaining of a proper balance between fair remuneration to the officers who administer the reorganization proceeding and limitation upon the total costs of administration so that resort to the Act does not

become unduly burdensome.[1] One of the controlling reasons for the enactment of the bankruptcy reorganization statutes to supplant state and federal equity procedures was the desire to reduce the costs of corporate reorganization to creditors and stockholders. *Callaghan* v. *Reconstruction Finance Corporation*, 297 U. S. 464, 468–469. In addition, Congress has recognized that a reorganization proceeding is not ordinary litigation between private parties, but normally involves the rights and interests of numerous public investors, many of whom are unrepresented or inadequately represented in the proceeding. The statutory provisions regulating costs and expenses of the reorganization are therefore designed to encourage wider participation by security holders and to establish safeguards assuring loyal and disinterested representation. *Cf. Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434.

The power necessary to effectuate these reorganization purposes is found in various provisions of the Bankruptcy Act. Article XIII

[1] Thus, in corporate reorganization proceedings it is customary to defer final allowances until the consummation of the proceedings in order that the aggregate amount allowed may be measured by the success of the proceedings and the estate's ability to pay. *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003 (C. C. A. 3, 1941); *In re Prudence Bonds Corp.*, 106 F. (2d) 44 (C. C. A. 2, 1939).

of Chapter X[2] (Secs. 241–250, 11 U. S. C. 641–650) is exclusively devoted to "Compensation and Allowances." To insure that all allowances out of the estate will be reasonably related to the size of the estate and the success of the reorganization, Sec. 258 (11 U. S. C. 658) effects centralized control over all administrative fees and expenses by providing that allowances for services rendered in state or federal court proceedings which are supplanted by reorganization proceedings must be fixed by the reorganization court

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[2] We do not refer to any of the provisions of former Sec. 77B of the Bankruptcy Act (11 U. S. C. 207) at this point for two reasons:

(1) The provisions of Sec. 77B, while not as detailed, indicate just as clearly as do the provisions of Chapter X that control over the allowance of fees must reside in the reorganization court.

(2) The provisions of Chapter X apply in their entirety to the corporate reorganization proceeding involved in this case. That proceeding was instituted on May 18, 1938 (R. 55), shortly before the enactment of Chapter X on June 22, 1938. However, the petition was not approved until January 19, 1939 (R. 56), some time after the effective date of Chapter X (September 22, 1938). Sec. 276c (1) of Chapter X (11 U. S. C. 676 (c) (1)) provides that if a petition under Sec. 77B is approved within three months prior to the effective date of Chapter X, the provisions of Chapter X shall apply in their entirety to the proceedings. Since the petition in this case was approved *subsequent* to the effective date of the amendatory Act, there can be no question that Chapter X is completely applicable. *Cf. In re Old Algiers*, 100 F. (2d) 374 (C. C. A. 2, 1938). This was fully recognized at the time the petition was approved, as shown by the order of approval (R. 55–61).

rather than by the court supervising the prior proceeding. See *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003, 1006 (C. C. A. 3, 1941); *cf. Gross* v. *Irving Trust Co.*, 289 U. S. 342.

Allowances may be made only after hearing upon notice to "the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate". (Sec. 247, 11 U. S. C. 647.) At such hearings interested parties enjoy the statutory right to be heard (Sec. 206; 11 U. S. C. 606), which includes the right to appeal. *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003 (C. C. A. 3, 1941).

The highest standards of fiduciary conduct are exacted of attorneys performing services for the reorganization estate. In seeking compensation under Chapter X they must file with the court a statement under oath showing claims against or stock of the debtor which have been acquired or transferred by them after the commencement of the proceeding. No compensation may be allowed to any attorney who, after assuming to act in a fiduciary capacity in the proceedings, has purchased or sold claims against or stock of the debtor. (Sec. 249, 11 U. S. C. 649; *In re Reynolds Investing Co., Inc.*, 130 F. (2d) 60 (C. C. A. 3, 1942.) The attorney seeking compensation must advise the district court by affidavit whether he has any agreement with any other person for a

division of his compensation. (See. 62d, 11 U. S. C. 102 (d).) He is precluded from making any agreement with a party in interest fixing the amount of his fee. (Act of August 25, 1937, c. 777, 50 Stat. 810, 28 U. S. C. 572a.)

Finally, the court's control over compensation is expressed in those provisions relating to the central purpose of reorganization—confirmation and consummation of a plan. This appears from Secs. 216 (3) and 221 (4). Section 216 prescribes the contents of any plan of reorganization and Subdivision 3 of that section requires the plan to "provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge." Sec. 221 provides that the judge shall confirm a plan if he is satisfied that "all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge." The plan of reorganization and the order of confirmation in this case contain appropriate provisions pursuant to these statutory mandates. See pp. 17–20, *infra*.

To implement still further the control of the bankruptcy court over fees and expenses, the General Orders in Bankruptcy promulgated by this Court provide that no attorney for a trustee shall be appointed except upon the order of the court (General Order 44). The bankruptcy court must be satisfied that the proposed appointee does not represent an interest adverse to the estate with respect to the matters upon which he is to be engaged; if such an interest remains undisclosed until after the appointment, the bankruptcy court is empowered to deny any allowance to the attorney (*ibid.; cf. Woods* v. *City National Bank & Trust Co. of Chicago*, 312 U. S. 262). General Order 44 and former General Order 42 (the equivalent of present Sec. 62 (d)) have been applied to the appointment and fees of attorneys retained to handle matters for the trustees in other states. *Albers* v. *Dickinson*, 127 F. (2d) 957, 961 (C. C. A. 8, 1942).

The compensation of attorneys appointed by a bankruptcy court to collect assets for the estate by pursuing causes of action in other courts is clearly an expense of the administration of the estate. See *Watkins* v. *Sedberry*, 261 U. S. 571; *W. J. Davidson & Co.* v. *Friedman*, 140 Fed. 853 (C. C. A. 6, 1906).[3] Accordingly, the foregoing

[3] The prosecution of causes of action like those conducted by the Attorneys in this case is an integral part of the administration of a Chapter X proceeding. One of the primary reasons for requiring the appointment of a disinterested

rules are applicable to the determination of such compensation.

When a state court undertakes to fix the fees of attorneys appointed by a bankruptcy court, as the lower New York courts did in this case, there results an inevitable collision with the clear intendment of the Bankruptcy Act. If a state court were allowed to fix the compensation of such attorneys, the reorganization court's centralized control over the proceeding before if would be dissipated, and the protection which Congress intended to accord to public investors would be denied. By the same token, if a state statute

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trustee in cases in which a substantial public investor interest exists (Sec. 156; 11 U. S. C. 556), is to assure the disclosure and pursuit of corporate assets in the form of claims against directors, officers, and others who may have misused corporate control for their personal benefit. See S. E. C. Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VIII, page 337. Thus, Sec. 167 (3), 11 U. S. C. 567 (3), requires the disinterested trustee to report to the court any fraud, misconduct, mismanagement, or irregularities disclosed by his investigation and the availability of any causes of action to the estate. This provision "insures prosecution of all causes of action." S. Rep. No. 1916, 75th Cong., 3d sess. (1938), page 29. So important is this aspect of the administration of the estate that Sec. 216 (13), 11 U. S. C. 616 (13), makes it mandatory for the plan to provide for the retention and continued enforcement by the disinterested trustee of all claims not yet settled or adjusted. Pursuant to this requirement, the state court litigation in the present case continued even after consummation of the reorganization plan (R. 52–53).

were to be construed to authorize a determination of such fees, it would be unconstitutional to that extent.

> The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—state and federal—must observe. [*Kalb* v. *Feuerstein*, 308 U. S. 433, 439.]

See also *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

It should be noted that a holding that Sec. 475 of the New York Judiciary Law, involved in this case, may not constitutionally operate to permit state determination of the amount of fees in this situation will not materially restrict the scope of

operation of that section.[4] The Attorneys' brief incorrectly conveys the impression that Sec. 475 provides a complete and customary machinery for the determination of the compensation of attorneys who prosecute causes of action in the courts of New York. On the contrary, as we shall show, resort to Sec. 475 is the exception, rather than the rule; resort to Sec. 475 is by no means closely related to the prosecution of the principal action in the New York courts; and Sec. 475 is available in only a small number of the situations covered by the fee allowance provisions of the Bankruptcy Act.

Section 475 is not, as the Attorneys have sought to imply, a normal procedure by which attorneys obtain their compensation for conducting litigation. It exists "for the protection of attorneys against the knavery of their clients." *In re Maggio's Estate*, 169 Misc. 1039 (Surr. Ct., N. Y. Co. 1938). Consequently, court proceedings to enforce the charging lien are instituted at the option of the attorney only when the conduct of the client makes them necessary. In most instances, "knavery" is absent and no proceedings are required.

Furthermore, these proceedings are not necessarily a part of the primary litigation; they may

[4] As we point out further in Point III, *infra*, Sec. 475, when read with Sec. 474, does not permit determination by the state court of the amount of fees under the contract here involved.

be instituted as special proceedings apart from the main action. See *Smith* v. *First National Bank of Albany*, 103 Misc. 274, 279 (Sup. Ct., Special Term, 1917), modified in 184 App. Div. 719 (App. Div. 3d Dept., 1918); *In re Jacobs*, 169 Misc. 893 (Sup. Ct. Special Term, 1938). They need not be brought before the judge who presided at the trial, nor even before the same court. For example, proceedings under Section 475 have been instituted in the Surrogate's Court to enforce a lien for services rendered in the United States Customs Court. See *In re Levine's Estate*, 154 Misc. 700 (Surr. Ct., N. Y. Co., 1935). Many times the proceedings are utilized not to obtain determination of the value of the services, but merely to collect fees specified by retainers.

The scope of Section 475 is much narrower than the allowance provisions of the Bankruptcy Act. Section 475 cannot be used where the action involved does not result in a recovery or does not seek a judgment for money or money's worth. See *Davidson* v. *American Blower Co.*, 245 Fed. 773 (N. D. N. Y., 1917). Thus, if attorneys appointed by a bankruptcy court are unsuccessful in a state court action to recover a money judgment, or if the retainer is to defend the estate, they have no alternative but to resort to the bankruptcy court for allowances. Moreover, the provisions of Section 475 are available only to

attorneys of record. See *Matter of Sebrina* 238 App. Div. 281 (App. Div., 4th Dept., 1933). Thus, other counsel, expert witnesses, accountants, the trustee, and any others who rendered services to the debtor estate in connection with the state court litigation would in any event be compelled to return to the bankruptcy court for their compensation. The use of Section 475 by the attorney of record would, therefore, result in division of responsibility between two courts for determination of the cost of a single litigation and would consequently dissipate effective control over this expense.

It is clear, therefore, that the enforcement feature of Section 475 is neither a mandatory nor an adequate substitute for the extensive compensation machinery provided in the Bankruptcy Act. The salient fact is that no machinery is furnished either in the form of state statute or state court procedure for safeguarding public investor interests. The state court in such a case has neither the information nor the statutory guides necessary to coordinate its decision with the needs of the debtor and its security holders or with the final results to be achieved in the reorganization proceeding.[5] See *In re Keystone*

[5] An emphatic illustration is furnished in this case. At the time the state court was fixing the Attorneys' lien at $100,000 (excluding interest) for securing judgments in Cause of Action #1 (R. 7, 113), the Trustees were applying to the reorganization court for authority to settle the judgments for $150,000 (R. 93).

Realty Holding Co., 117 F. (2d) 1003 (C. C. A. 3, 1941), *supra*, and cases cited.

We submit, therefore, that the state statute may not be permitted to operate in this situation in a manner inconsistent with the paramount jurisdiction of the reorganization court over fees and expenses.

II

THE UNITED STATES DISTRICT COURT HAS NOT SURRENDERED ITS EXCLUSIVE JURISDICTION TO DETERMINE THE FEES TO BE ALLOWED THE ATTORNEYS

The federal reorganization court did nothing in this case which can be construed as a surrender to the state courts of jurisdiction over the Attorneys' fees. On the contrary, the federal court repeatedly made clear that it retained such jurisdiction.

The plan of reorganization consummated in the proceeding specifically dealt with the state court actions and with the payment of compensation and expenses in connection with those actions. Article XI of the plan is as follows (R. 52–53):

> XI. RESERVATION OF CAIMS
>
> All claims in favor of the Debtor or of the Debtor's estate not settled or adjusted in the reorganization proceedings, or in the plan, or in connection with the consummation of the plan, shall be retained and enforced by the Trustees. The Company

shall cooperate with and assist the Trustees in every way in the prosecution and collection of such claims.

The Trustees shall have full power to prosecute pending actions and proceedings involving such claims, and to bring additional actions or proceedings in the courts of any jurisdiction. They shall also have full power to employ, retain, or displace, attorneys or counsel representing them in any action or proceeding, whether such action or proceeding be pending at the time of the consummation of the plan or not. They shall not, however, have any power to discontinue, compromise or settle any action or proceeding without the express approval of the Court.

The Court will retain continuing jurisdiction over such claims and the prosecution thereof, and over the Company, its books, records and papers, and the Trustees, in connection therewith, after the final decree in the reorganization proceedings. *The Court will from time to time fix the reasonable compensation to be paid to the Trustees, and their attorneys or counsel, for services in the prosecution of such claims, and the Company shall assume and pay the amount of such compensation as well as all other expenses incurred or paid by the Trustees in the prosecution, collection, or other disposition of the claims.* If the value of the portfolio of the Company shall, at any time prior to a complete and final adjustment on the merits of all of the claims reserved to the Trustees, be $300,000

or less, the assets of the Company shall not be further depleted by purchases or redemptions of debentures or shares of preferred stock without order of the Court after a hearing upon notice to the Trustees.[6] In such order the Court will specify the financial arrangements to be made by the Company for the payment of all expenses then already incurred in connection with the claims as well as such other expenses as may reasonably be necessary in the further prosecution thereof.

The net proceeds ultimately resulting from the prosecution or other disposition of the claims will be paid to the Company. [Italics supplied.]

In conformity with Section 221 (4) (11 U. S. C. 621 (4)) the order confirming the plan (R. 62–67) recites that the court is satisfied that "all payments made or promised by the debtor, or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge" (R. 63). The same order further pro-

[6] This reservation of at least $300,000 of assets to provide compensation for the Attorneys' claims and other expenses emphasizes the federal court's intention to retain complete control.

vides that "the debtor shall pay all the costs and expenses of administration as shall hereafter be approved by the Judge after hearing upon notice as provided in Sections 62d and 247 of the Bankruptcy Act, and no other sums shall be paid by the debtor or by any other person, for services and for costs and expenses in the proceeding or in connection therewith, or in connection with the plan or incident to the reorganization" (R. 66). As we point out below, *infra*, pp. 32–33, the Attorneys acquiesced in the terms of the plan and the order of confirmation.

Finally, the stipulation of July 9, 1941, signed by the Trustees and approved by the district court (R. 24–26), contains the following specific reservation of rights (R. 26):

> 7. Nothing herein shall constitute a waiver of the rights of petitioners or respondents to question the jurisdiction of the courts of the State of New York, or the United States District Court for the District of New Jersey, with respect to the determination of the existence, nature or extent of respondents' liens and the payment of their fees and disbursements in connection with the aforesaid litigation.

Upon the Attorneys' application to the New York court for the determination of the lien, the reorganization Trustees requested the state court to recognize the exclusive jurisdiction of the federal court (R. 31, 69–70, 72–73). After this request was denied, the Trustees participated no

further in the state court proceedings (R. 73). Thus, the federal court and its Trustees observed the orderly procedure recommended in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 345, where this Court stated:

> Nevertheless, due regard for comity—which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former * * *.

This was consistent with the purpose of the district court throughout the proceedings to retain the power to fix interim and final allowances for the services rendered by the Attorneys.

Despite this evidence of the district court's determination not to relinquish control over the fees of the Attorneys, it is contended (Pet. Br. 11–23) that surrender must be implied from the District Court's granting of permission to prosecute the suits in the state court.[7] Principal reliance is placed upon *Sherman* v. *Buckley*, 119 F. (2d) 280 (C. C. A. 2, 1941), certiorari denied, 314 U. S.

[7] The Attorneys' contention overlooks the ordinary rule that the surrender of a matter arising in the course of a bankruptcy proceeding cannot be implied, but must be absolute and specific to permit a state court to assume jurisdiction. See *Palmer* v. *Larchmont Manor Co.*, 284 N. Y. 288 (1940);

657; *In re Cup Craft Paper Corporation*, 40 F. Supp. 927 (S. D. N. Y., 1941), affirmed *sub nom. New York Credit Men's Assn.* v. *Schlesinger*, 126 F. (2d) 472 (C. C. A. 2); and *Cup Craft Paper Corp.* v. *Federal Paper Board Co.*, 262 App. Div. 91 (1941); affirmed 289 N. Y. 671 (1942). In these cases, however, the statutory liens had attached prior to the institution of the bankruptcy proceeding. The state court actions had been commenced by the bankrupts through the attorneys involved in the lien proceedings before the filing of the bankruptcy petitions, and all substantial services had been performed prior to the commencement of the bankruptcy proceedings.* Section 67b of the Bankruptcy Act (11 U. S. C. 107) specifically recognizes the validity of such liens for services rendered prior to bankruptcy and provides that they may be perfected subsequent to bankruptcy. See *In re Prudence Co.*, 96 F. (2d) 157, 160 (C. C. A. 2, 1938), certiorari denied, *sub nom. McGrath, et al.* v. *Davison*, 305 U. S. 616. In the present case, *the Attorneys were originally appointed by the federal reorganization court*, and went into the state court as officers of the federal court subject to the provisions of the

* It is true that the services of the attorneys in *Sherman* v. *Buckley* were not terminated until February 25, 1935, although the bankrupt was adjudicated on January 11, 1934. During this period, however, the attorneys continued to serve under their retainer from the bankrupt, and were never authorized by the bankruptcy court to act as attorneys for the trustee. Consequently, our argument concerning the attorneys in the *Prudence* case is equally applicable to this situation. See *infra*, pp. 24–25.

Bankruptcy Act with respect to compensation for their services. *In re Stemper*, 222 Fed. 690, 692 (D. Ariz., 1915); *In re Flaherty*, 295 Fed. 699, 700 (D. Mont., 1924).

We do not understand the *Buckley* case as intimating that the mere submission to another court of the prosecution of an action by appointees of a bankruptcy court constitutes a surrender of all control over the matter.[9] The circuit court of appeals recognized that jurisdiction is retained over such incidents as the settlement or discontinuance of the suit,[10] since these are bankruptcy matters within the exclusive jurisdiction of the bankruptcy court. Likewise, we

[9] In the *Buckley* case, upon which the *Cup Craft* case relied, the trustee voluntarily submitted to the state court procedure for substitution of attorneys in the action pending, suggested that the state court grant a charging lien to the displaced attorneys, made the motion upon which the state court fixed the lien, and acted under the order of the state court fixing the lien for five and one-half years. In other words, that case involved something more than the submission to the state court of the prosecution of a cause of action. It is therefore understandable that the circuit court of appeals viewed the permission granted to the state court in that case as necessarily involving "a consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated" (119 F. (2d) at 282).

[10] The court stated (119 F. (2d) at 282): "We need not, and we do not, hold therefore that if the trustee had brought Buckley & Buckley summarily into the bankruptcy court and insisted upon the liquidation of their lien, preparatory for example to a discontinuance or settlement of the action, they would have had any defence." See Bankruptcy Act, Sec. 27 (11 U. S. C. 50).

submit, the award of compensation to attorneys appointed by a court of bankruptcy, as distinguished from attorneys employed before bankruptcy by the bankrupt or debtor, is exclusively an administrative problem remaining with the court of appointment, and is not an automatic adjunct of the enforcement of the cause of action.

In *In re Prudence Company, Inc.*, 96 F. (2d) 157 (C. C. A. 2, 1938), certiorari denied *sub nom. McGrath, et al.* v. *Davison*, 305 U. S. 616, also relied on by the Attorneys, the suit was likewise instituted prior to reorganization by an attorney selected by the debtor. Instead of taking over the prosecution of the suit, the reorganization trustee elected to allow the suit to be continued by the debtor and its attorney. This course, the court found, enabled the trustee "to obtain the benefit of such judgment as the debtor might finally obtain without subjecting the estate to liability for past or future services of the attorney or for costs, in case the suit should fail." (96 F. (2d) at 159). Thus, while services were performed by the attorney subsequent to the reorganization petition, they were performed pursuant to the retainer with the debtor and not as court appointee. Nevertheless, when the suit had been successfully concluded, the attorney moved in the *reorganization court* for an order awarding him compensation in accordance with his retainer; he made no effort to enforce his charging lien in any other court. The case

merely reaffirms the conceded proposition that where a valid charging lien exists it will be enforced by the bankruptcy court and there is no occasion to seek its enforcement elsewhere. This is a far different matter from implying the surrender of the court's control over the fees of its appointees.

The Attorneys have devoted a whole point (Pet. Br., Point III, pp. 26–36) to an argument founded on a misunderstanding of the basis of the decision below and of the Trustees' position. The Attorneys assume that the decision rests on the grant in Chapter X to United States district courts of jurisdiction over plenary actions brought by trustees. They then argue that the reliance on this grant of jurisdiction in Chapter X is misplaced, because the trustees' Cause of Action No. 1 was brought while Sec. 77B was in effect, and under Sec. 77B the United States district courts had no equivalent power over plenary suits.

The Attorneys' argument is irrelevant, for they have misconceived the nature of the bankruptcy powers relied upon. The court below and the Trustees rely on the provisions of the Bankruptcy Act which permit the district court to control the causes of action *as assets of the estate*, and to control fee allowances for services in the collection of these assets. See *supra*, Point I. In

this respect the provisions of Sec. 77B were not materially different from those of Chapter X.

The Trustees' argument in no sense rests on the power of the district court over the causes of action as *justiciable controversies*. Accordingly, while it is true that there is a difference between Sec. 77B and Chapter X with respect to the judicial power of the district courts to adjudicate the causes of action, that difference in power is not material to the basis of the decision below or to the Trustees' argument.

Furthermore, as applied to the circumstances of this case, the district court in New Jersey would have no greater power under Chapter X to entertain suits against defendants in New York than it would have in Section 77B. While the point is irrelevant, the Attorneys have devoted so much space to the problem that, for the Court's convenience, we discuss in the following paragraphs the change wrought by Chapter X in the power of the district court to adjudicate causes of action in favor of the estate.

The change rests in the fact that Sec. 23 of the Bankruptcy Act (11 U. S. C. 46) is expressly made inapplicable to Chapter X, while it was applicable to Sec. 77B.[11] But the only conse-

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[11] Bankruptcy Act, Sec. 102 (11 U. S. C. 502); *Warder* v. *Brady*, 115 F. (2d) 89 (C. C. A. 4, 1940); see *In re Standard Gas & Electric Co.*, 119 F. (2d) 658 (C. C. A. 3, 1941); *Tilton* v. *Model Taxi Corp.*, 112 F. (2d) 86 (C. C. A. 2, 1940).

quence of this change is to add to the number of forums which may entertain plenary suits. Section 23 invests the United States district courts with jurisdiction to entertain controversies arising out of proceedings in bankruptcy between trustees and adverse claimants, but further provides that such plenary suits, as distinguished from summary proceedings in bankruptcy, may be brought only in the state or federal courts where the bankrupt might have brought or prosecuted them. The net effect of these provisions is that a plenary suit may be initiated in the federal courts only when the customary elements of federal jurisdiction exist, e. g., diversity of citizenship.

In declaring Section 23 expressly inapplicable, Chapter X has substituted the equity receivership rule that a receiver may sue in the federal court of his appointment without satisfying the ordinary requirements for federal jurisdiction. *White* v. *Ewing*, 159 U. S. 36, 39; *Krippendorf* v. *Hyde*, 110 U. S. 276. Thus, the only change wrought by Chapter X in this connection is to provide, as an additional forum, the federal district court in which the Chapter X proceedings are pending. *Cf. Grant* v. *Buckner*, 172 U. S. 232, 238; *Equitable Trust Co.* v. *Donney*, 24 F. (2d) 169, 171 (C. C. A. 7, 1928). In this forum the action is still plenary and not summary, service over the defendants must be acquired in the manner usual

to plenary suits, and the geographical rules as to service of process apply. See *Warder* v. *Brady*, 115 F. (2d) 89, 94 (C. C. A. 4, 1940). Since personal jurisdiction over the defendants could not be obtained in New Jersey, where the reorganization proceedings are pending, the causes of action involved here had to be instituted in a New York court, and the situation in this respect is precisely the same under Chapter X as under Sec. 77B.

The coincidental fact that a plenary suit is brought in the same federal court in which the reorganization is pending gives the judge presiding over the reorganization no greater control over the trial of the plenary action than he could exercise over the same suit in a state court. Thus, whether Sec. 77B or Chapter X be applied,[12] and whether the suit be brought in a state court or a federal court, the litigation itself is equally free from interference by the reorganization court. The court which is entertaining the suit has indisputable jurisdiction over the cause of action insofar as it is a "controversy" or a plenary suit. Only that court, for example, can pass upon the validity of service of process, determine the sufficiency of the pleadings, or award judgment. But these incidents of the plenary action are not to be confused, as the Attorneys have done, with mat-

[12] We have shown that the provisions of Chapter X are applicable in their entirety to these proceedings. (See *supra*, footnote 2, page 8.)

ters incident to the debtor's administration in reorganization. In the sense that these causes of action are assets of the debtor to be administered in the proceedings, they are subject to the control of the reorganization court. That court alone may decide whether actions should be brought, in which of the available forums they should be conducted, what attorneys should be retained to pursue them, whether and on what terms they should be settled or discontinued (see *supra*, footnote 5, p. 16), and what fees and expenses should be awarded to its appointees.

III

IT WAS AN IMPLIED TERM OF THE EMPLOYMENT OF THE ATTORNEYS THAT THEY WOULD LOOK TO THE REORGANIZATION COURT FOR ALLOWANCE AND PAYMENT OF THEIR CLAIM. ACCORDINGLY, SEC. 475, READ IN CONNECTION WITH SEC. 474, DOES NOT AUTHORIZE DETERMINATION OF SUCH CLAIM BY THE STATE COURT

We do not believe that Sec. 475, properly applied, conflicts with jurisdiction of the reorganization court, or that it compels an unconstitutional result in this case. The lien provided by Sec. 475 is designed to protect the agreement for compensation authorized by Sec. 474 of the New York Judiciary Law. The two sections must be considered together. They provide as follows:

§ 474. *Compensation of attorney or counsellor.*

The compensation of an attorney or

counsellor for his services is governed by agreement, express or implied, which is not restrained by law * * *.

§ 475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

To determine what was the contract which Sec. 475 is designed to protect, it is necessary to consider the terms of the appointment of the Attorneys. The order authorizing them to bring the state court action does not specify the terms of the retainer. Those terms must, consequently, be implied from the circumstances, legal and factual, under which the services were authorized and rendered. The New York Court of Appeals

has found that "*both as a matter of law and as a matter of fact* the retainer of these attorneys was subject to the condition that the amount of any fees would be fixed by the United States District Court" (R. 128) [italics added]. The controlling statutory provisions of Chapter X, which in our view must be read into the contract,[13] and the facts of this case amply support this finding.

As we have pointed out, the prosecution of the state court actions was a part of the administration of the reorganization estate; and, under the provisions of the Bankruptcy Act, compensation for services in connection with such administration must be allowed by the bankruptcy court after compliance with procedural requirements as

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[13] This is not the only situation where statutory conditions have been implied as a matter of law in retainers authorized by Sec. 474. For example, Sec. 133 of the New York Decedent Estate Law provides that the reasonable expenses of actions for the wrongful death of a decedent may be fixed by the Surrogate. This has been held to empower the Surrogate to fix a reasonable fee for an attorney's services in prosecuting such an action in another court despite the express terms of the retainer between the attorney and the representative of the decedent's heirs. See *Matter of Meng*, 227 N. Y. 264 (1919); *Pantano* v. *Erie County Savings Bank of Buffalo*, 257 App. Div. 451 (4th Dept. 1939). Sometimes the fee is fixed by the New York Supreme Court because it has concurrent jurisdiction with the Surrogate over such matters. See *Matter of Atterbury*, 222 N. Y. 355 (1918). In citing cases of this character for the proposition that the fees may be fixed on a *quantum meruit* basis (Pet. Br. 14–15), the Attorneys have ignored the cited provision of the Decedent Estate Law.

to notice and hearing and filing of affidavits negativing the existence of possible disqualifications. *Supra*, pp. 9–10. General Order in Bankruptcy 44, which requires court authorization for the appointment of attorneys to represent trustees in any matter, clearly envisions that the compensation of the attorneys will be controlled by the bankruptcy court. We have pointed out that this order applies to employment of attorneys to prosecute claims on behalf of the estate. *Supra* p. 11. The district court's control is so complete that the trustee may not even adjust the attorneys' fees for such services by agreement. *In re Flaherty*, 295 Fed. 699 (D. Mont., 1924); *In re Stemper*, 222 Fed. 690 (D. Ariz., 1915). We believe that the conclusion is inescapable that it was an implied term of the agreement that the attorneys appointed by the federal court would look for their fees to the procedure specified in the statute governing their appointment.

This conclusion is borne out by the statutory provisions governing formulation and confirmation of the plan, which require provision for fees to be made in the plan and further require a finding of the court that the fees are reasonable or will be subject to the court's subsequent approval. *Supra* p. 10.

The statutory scheme was fully adhered to by the district court and the parties in this case. As we have shown, *supra* pp. 17–20, the plan and the

order of confirmation clearly reserved to the reorganization court the power to determine compensation for the prosecution of the causes of action. The Attorneys acquiesced in both the plan and the order. The Attorneys already had performed services in the state courts when the plan was filed and when it was confirmed. Yet they raised no objection to the plan or to the order of confirmation. This circumstance emphatically supports our view that the statutory scheme contemplating allowance of the Attorneys' fees by the reorganization court was an implied term of the agreement of employment."

Further confirmation for this view of the contract comes from the practice and custom in such situations. The cases dealing with similar situations have uniformly recognized that the compensation of attorneys appointed by a bankruptcy

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"In this case, unlike *Sherman* v. *Buckley* and the *Cup Craft* cases, there has been no breach of the agreement of employment by discharge of the attorneys. Petitioners (Pet. Br. 25) cite language of the New York *nisi prius* judge implying that there had been a discharge in this case, and then erroneously state that the New York Court of Appeals did not disturb this finding. On the contrary, the Court of Appeals said (R. 128):

"* * * the attorneys in both of these cases [*Sherman* v. *Buckley* and the *Cup Craft* cases] were discharged and not permitted to complete the services for which they had been employed under a single contract of contingent retainer, whereas the attorneys herein were permitted fully to perform the services for which they were appointed, namely to reduce the claims to judgment."

court to perform administrative services should be fixed by that court, even though the services consisted of prosecutions of actions in other courts. *Watkins* v. *Sedberry*, 261 U. S. 571; *In re Cheney*, 300 Fed. 465 (D. Mass., 1924); *In re Evans*, 117 Fed. 574 (E. D. N. C., 1902); *In re McKenna*, 137 Fed. 611 (N. D. N. Y., 1905); *In re J. M. Fiske & Co.*, 209 Fed. 982 (S. D. N. Y., 1913); *In re Stemper*, 222 Fed. 690 (D. Ariz., 1915); *In re Levinson*, 19 F. (2d) 253 (W. D. Wash., 1927); *Watters* v. *Hamilton Gas Co.*, 29 F. Supp. 436, 477 (S. D. W. Va., 1939). We know of no case other than the present one in which attorneys who were first appointed by the bankruptcy court have sought an allowance of fees elsewhere than in that court.

The crucial question here is not whether a lien exists, but rather which court may determine the fees. Since approval of the Attorneys' fees by the reorganization court was clearly a condition of the original authorization, we submit that the lien under Sec. 475 (even if available to the Attorneys) cannot be enforced in disregard of that condition. Sec. 475 does not authorize determination of the amount of attorneys' compensation by the state court if the parties' contract contemplates determination in some other manner. Thus clearly Sec. 475 could not be used to procure a determination of the amount of services in an amount greater than that contained in the agreement of retainer, no matter what the reason-

able value of the services might be. It has even been held in New York that there is no lien under Sec. 475 unless it was within the contemplation of the parties that the attorneys would be paid out of the proceeds of the recovery. In *Matter of Heinsheimer,* 214 N. Y. 361, 368 (1915), the court said:

> A charging lien cannot exist unless it is an element, express or implied, of the agreement that the lawyer is to be paid out of the fruits of the judgment.

Our view of the contract and the application of Sec. 475 thereto is supported by the approach taken by the New York Court of Appeals. That court said (R. 126–129):

> * * * since these attorneys were appointed by the court in this reorganization proceeding and nothing was said as to fees, the services of the attorneys were undertaken subject to all the provisions of the Bankruptcy Act with respect to the compensation for such services. * * * Under such circumstances, even if no exclusive jurisdiction had been given to the Federal court, the attorneys would in the normal course return to have their compensation fixed by the court by whom their appointment had been made. * * * It is unnecessary to consider whether it was within the power of the court to surrender this jurisdiction, since it would appear that both as a matter of law and as a matter of fact the retainer of these attorneys was subject to the condition that the amount

of any fees would be fixed by the United States District Court. * * * As already noted, in the case at bar the attorneys were appointed by the court pending the reorganization proceeding to perform services as agents and appointees of the court. The allowances for the attorneys were administration expenses covered by the allowance provisions of the Bankruptcy Act.

It follows that the orders appealed from should be reversed and the proceedings dismissed without costs.

CONCLUSION

For all of the above reasons, the judgment of the Court of Appeals for the State of New York should be affirmed.

Respectfully submitted,

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DECEMBER 1943.

APPENDIX

CONSTITUTION OF THE UNITED STATES (ARTICLE 1, SECTION 8, CL. 4)

The Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

STATUTES INVOLVED

JUDICIAL CODE, SECTION 256 (28 U. S. C. 371)

EXCLUSIVE JURISDICTION OF UNITED STATES COURTS

The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.

* * * * *

Sixth. Of all matters and proceedings in bankruptcy.

BANKRUPTCY ACT

SEC. 23 (11 U. S. C. 46). JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

SEC. 27 (11 U. S. C. 50). COMPROMISES.—The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.

SEC. 62 (11 U. S. C. 102). EXPENSES OF ADMINISTERING ESTATES; UNAUTHORIZED SHARING OF FEES; WITHHOLDING ALLOWANCES.—

* * * * *

d. A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of this subdivision, the court shall withhold all compensation from such petitioner.

SEC. 67 (11 U. S. C. 107). LIENS AND FRAUDULENT TRANSFERS.—

* * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

SEC. 167 (11 U. S. C. 567). The trustee upon his appointment and qualification—

* * * * *

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

SEC. 206 (11 U. S. C. 606). The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this

chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees.

ARTICLE X—PROVISIONS OF PLAN

SEC. 216 (11 U. S. C. 616). A plan of reorganization under this chapter—

* * * * * *

(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

* * * * * *

(13) may include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and shall provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee or, if the debtor has been continued in possession, by an examiner appointed for that purpose; * * *

ARTICLE XI—CONFIRMATION AND CONSUMMATION OF PLAN

SEC. 221 (11 U. S. C. 621). The judge shall confirm a plan if satisfied that—

* * * * * *

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the

reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; * * *

ARTICLE XIII—COMPENSATION AND ALLOWANCES

SEC. 241 (11 U. S. C. 641). The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—

(1) by a referee;

(2) by a special master;

(3) by the trustee and other officers, and the attorneys for any of them;

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act.

SEC. 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

(2) by any other parties in interest except the Securities and Exchange Commission; and

(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

SEC. 243 (11 U. S. C. 643). The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.

SEC. 244 (11 U. S. C. 644). Where a petition is filed under section 127 of this Act, the judge may allow, if not already allowed, reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in the pending bankruptcy proceeding—

(1) by a marshal, receiver, or trustee, as provided in subdivision g of section 48 of this Act, and the attorneys for any of them;

(2) by the attorney for the petitioning creditors;

(3) by the attorney for the bankrupt; and,

(4) by any other persons and the attorneys for any of them entitled under this Act to compensation or reimbursement in such bankruptcy proceeding.

SEC. 245 (11 U. S. C. 645). Where a petition is filed in a pending bankruptcy proceeding, the judge may allow reasonable compensation for services rendered and the proper costs and expenses incurred in such bankruptcy proceeding by a referee in bankruptcy. In fixing such compensation, the judge shall not be restricted by the provisions of section 40 of this Act.

SEC. 246 (11 U. S. C. 646). Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provision for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings.

SEC. 247 (11 U. S. C. 647). The judge shall fix a time of hearing for the consideration of applications for allowances, of which hearing notice shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate, except that, in the case of allowances for services and reimbursement in a superseded bankruptcy proceeding, notice need be given only to the applicants, the debtor, the trustee, and the unsecured creditors, and may be given to such other classes of creditors or other persons as the judge may designate. In the case of the dismissal of a proceeding under this chapter and the entry of an

order therein directing that bankruptcy be proceeded with, notice of the hearing to consider allowances need not be given to stockholders.

SEC. 248 (11 U. S. C. 648). In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that a superseded bankruptcy be proceeded with, the compensation allowed by the judge, in the course of the proceeding under this chapter, to the referee, marshal, receiver, or trustee in the bankruptcy proceeding for services rendered by them in such bankruptcy proceeding shall be deemed to have been allowed in such bankruptcy proceeding, and such compensation shall be considered in connection with the making of future allowances therein or shall be readjusted, so as to comply with the provisions of this Act fixing their compensation in a bankruptcy proceeding.

SEC. 249 (11 U. S. C. 649). Any person seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior

consent or subsequent approval of the judge, been otherwise acquired or transferred.

SEC. 250 (11 U. S. C. 650). Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

SEC. 258 (11 U. S. C. 658). The judge shall make such provision as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable costs and expenses incurred therein as may be allowed by the judge.

SEC. 276 (11 U. S. C. 676).

* * * * * *

c, the provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings;

* * *.

ACT OF AUGUST 25, 1937, C. 777, 50 STAT. 810, 28 U. S. C. 572A

(a) it shall be unlawful for any party in interest, or any attorney for any party in interest, in any receivership, bankruptcy, or reorganization proceeding, in or under the supervision of any court of the United States, to enter into any agreement, written or oral, express or attorney of any other party in interest, in such proceeding for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in such proceeding, for services rendered in connection therewith when such fees or other compensation are to be paid from the assets of the estate in receivership, bankruptcy or reorganization. As used in this section, the term "party in interest" includes any debtor, creditor, receiver, or trustee and any representative of any of them.

GENERAL ORDERS IN BANKRUPTCY

GENERAL ORDER NO. 44.—APPOINTMENT OF ATTORNEYS

No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party

in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the judge, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77, when such employment is found by the judge to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

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p. 8; 4,

SUPREME COURT OF THE UNITED STATES.

No. 183.—October Term, 1943.

B. H. Inness Brown, David Paine, Ethelbert Warfield, et al., Petitioners,

vs.

John Gerdes and James D. Carpenter, Jr., Trustees of Reynolds Investing Co., Inc., Debtor.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[February 7, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is whether the New York court or the federal bankruptcy court has the power to fix the fees of petitioners who as attorneys represented the bankruptcy estate in litigation in the state courts. The New York Court of Appeals held that that jurisdiction rested exclusively in the bankruptcy court. 290 N. Y. 468. The case is here on a petition for writ of certiorari which we granted because of the importance of the problem under the Bankruptcy Act.

In January, 1939, a petition for reorganization of Reynolds Investing Co., Inc. was approved under Ch. X of the Bankruptcy Act. 52 Stat. 883, 11 U. S. C. § 501. In August, 1938, while the petition was pending but before its approval, the bankruptcy court authorized the debtor to commence an action in the New York courts to enforce and collect certain claims which the debtor had against its former officers and directors. See 28 N. Y. S. (2d) 622. It also authorized retention of petitioners as counsel in the suit. After the approval of the petition the respondent trustees were authorized to prosecute the action and to be substituted as plaintiffs. That was done; and other actions were instituted by the trustees under order of the bankruptcy court with petitioners as counsel. In 1941 before final judgments were obtained in any of the suits, the trustees discontinued petitioners' services. Thereafter petitioners, pursuant to a stipulation[1] which

[1] Respondents sought an order from the bankruptcy court directing petitioners to turn over their papers and memoranda. That motion was resisted by petitioners who claimed that the New York court had exclusive jurisdiction.

reserved respondents' right to question the jurisdiction of the state court, instituted this suit in that court to fix and enforce their liens on the actions under § 475 of the New York Judiciary Law.[2] Respondents' objection to the jurisdiction of the state court was overruled, the value of petitioners' services determined, and the liens fixed. Those orders were affirmed by the Appellate Division (264 App. Div. 852) but reversed by the Court of Appeals. And as we read the opinion of that court the basis of its decision was that "exclusive jurisdiction" to fix these fees was in the bankruptcy court (290 N. Y. 472, 473, 475), not that New York as a matter of local law or policy would not undertake to fix them because of the special circumstances of this case.

We agree with the Court of Appeals that the power to determine the amount of these fees rests exclusively in the bankruptcy court.

Sec. 77B, like § 77 of the Bankruptcy Act,[3] had as one of its purposes the establishment of more effective control over reorganization fees and expenses (*Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 388; *Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464, 469) in recognition of the effect which a depletion of the cash resources of the estate may have on both the fairness and feasibility of the plan of reorganization. *United States* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 282 U. S. 311, 333-340 (dissenting opinion). And Ch. X of the Chandler Act which took the place of § 77B set up even more comprehensive supervision over compensation and allowances (H. Rep. No. 1409, 75th Cong., 1st Sess., pp. 45-46) and provided a centralized control over all administration expenses, of which lawyers' fees are a part. *Watkins* v.

Thereupon a stipulation was entered into with the approval of the bankruptcy court whereby respondents withdrew their motion and petitioners agreed to institute a suit in the state court for fixation of their liens, if any. The parties reserved their right to question the jurisdiction of the state court or bankruptcy court over the matter.

[2] "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

[3] See Continental Bank v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 685; Reconstruction Finance Corp. v. Bankers Trust Co., 318 U. S. 163.

Sedberry, 261 U. S. 571. Sec. 241 gives the judge authority to fix "reasonable compensation for services rendered" by various persons, including attorneys for the trustees. Allowances may be made only after hearing and upon notice to specified persons and groups of persons. § 247. Where the reorganization supersedes a prior proceeding in either the federal or state court the bankruptcy court is the one which is authorized to allow the "reasonable costs and expenses incurred" in the prior proceeding. § 258. In all cases persons who seek compensation for services or reimbursement for expenses are held to fiduciary standards. § 249; *Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262, 267-269. And § 250 contains special appeal provisions governing orders granting or denying allowances. *Dickinson Industrial Site, Inc.* v. *Cowan*, *supra*. Moreover, a plan of reorganization must provide "for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge." § 216(3). In addition the plan must provide, in furtherance of the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 22; H. Rep. No. 1409, *supra*, pp. 42-44), for retention and enforcement by the trustee of all claims of the debtor or the estate not settled or adjusted in the plan. § 216(13). Finally, § 221(4) provides that in approving any plan the judge must be satisfied that "all payments made or promised" by the debtor, the new company, or any other person "for services and for costs and expenses" are not only fully disclosed but "are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge."

Thus Ch. X not only contains detailed machinery governing all claims for allowances from the estate. It also requires the plan to contain provisions for the payment of all allowances and places on the judge the duty to pass on their reasonableness. The approval of the plan of reorganization has been entrusted to the bankruptcy court exclusively. Even reports on plans submitted by the Securities and Exchange Commission are "advisory only". § 172. It could hardly be contended that the bankruptcy court might dispense with the finding required by § 221(2) that the plan is "fair and equitable, and feasible" and confirm the plan on another basis or delegate the task to another court or agency. *See Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 114-

115; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510. But if that cannot be done, it is difficult to see how a plan could be confirmed which left the approval of certain allowances to a state court. The finding as to allowances required by § 221(4) is as explicit and as mandatory as the finding of "fair and equitable, and feasible" required by § 221(2). On each Congress has asked for the informed judgment of the bankruptcy court, not another court or agency. In the present case the plan of reorganization which was approved in 1940 gave the trustees full power to retain or displace attorneys representing them; and it retained in the bankruptcy court continuing jurisdiction over all claims in favor of the debtor and the prosecution thereof. And in accordance with the express requirements of § 221(3) it left to the bankruptcy court the power to fix the "reasonable compensation" to be paid the attorneys of the trustees. Those requirements, prescribed by the Act, cause any conflicting procedure in the state courts to give way.[4] *Kalb* v. *Feuerstein*, 308 U. S. 433. The jurisdiction which Congress has conferred on the bankruptcy court is paramount and exclusive. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. Thus the supervention of bankruptcy deprives a state court in which a receivership was pending, of power to fix the compensation of the receivers and their counsel who were appointed by the state court and who rendered service in the state proceedings. *Gross*, v. *Irving Trust Co.*, *supra*; *Emil* v. *Hanley*, 318 U. S. 515, 519.

Sherman v. *Buckley*, 119 F. 2d 280, which arose in ordinary bankruptcy, is relied upon for the contrary conclusion. In that case an action brought by the bankrupt had been pending in the state court for seven years before the adjudication in bankruptcy. The trustee obtained the consent of the bankruptcy court to allow the action to be prosecuted in the state court on behalf of the estate and to substitute attorneys other than those retained by the bankrupt. It was held that the state court could require as a condition upon the substitution the liquidation of the New York charging lien of the displaced attorneys. Whether that case was correctly decided on its facts we need not stop to inquire. It is sufficient to say that it does not state the correct rule of law under Ch. X of the Act.

[4] The submission of the matter to the state court with objections to its jurisdiction was a procedure which gave that "due regard for comity" suggested by the Court in Gross v. Irving Trust Co., 289 U. S. 342, 345.

It is said, however, that § 77B rather than Ch. X measures the jurisdiction of the bankruptcy court since the main suit was instituted in the state court prior to the effective date of Ch. X, September 22, 1938. See § 7. But the short answer is that the petition was approved after that date and the provisions of Ch. X were thus brought into play.[5] It is suggested that since § 23 of the Act[6] was applicable to reorganizations under § 77B but inapplicable[7] to those under Ch. X (§ 102), there was a greater limitation on the jurisdiction of the bankruptcy court over plenary suits at the time the main suit was instituted than there was after Ch. X became effective.[8] From that it is argued that since Congress left the enforcement of such claims to the state courts, it permitted them to control all incidents of the litigation including the fixing of attorneys' liens. Sec. 23 deals with questions of the jurisdiction of federal district courts, e. g., whether in suits by trustees in bankruptcy against adverse claimants the jurisdiction of the district courts rests on consent of the parties regardless of diversity of citizenship. *Schumacher* v. *Beeler*, 293 U. S. 367. The fact that the suits against the former officers and directors of the debtor could have been brought in the state courts alone does not advance the solution of the present problem. A bankruptcy trustee who by choice or by necessity resorts to a state court for the prosecution of a claim is of course bound by the adjudication made in the state proceeding. *Winchester* v. *Heiskell*, 119 U. S. 450; *Fischer* v. *Pauline Oil & Gas Co.*, 309 U. S. 294, 303. The state court has full control over the litigation. But even as an incident thereto, it may not take action which involves the performance of functions which Congress has entrusted to the bank-

[5] Even if the petition had been approved prior to the effective date of Ch. X its provisions would have applied in their entirety to the proceedings provided such approval was within three months prior to that date. § 276 (c) (1).

[6] Sec. 23 presently provides: "'a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. 'b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.'"

[7] See Weinstein, The Bankruptcy Law of 1938 (1938), pp. 63-64; 2 Collier on Bankruptcy (14th ed.), pp. 435-436.

[8] See In re Standard Gas & Electric Co., 119 F. 2d 658.

ruptcy court. See *Eau Claire National Bank* v. *Jackson*, 204 U. S. 522, 537-538.

The suggestion has been made that New York could open its courts to the prosecution of such suits as the trustees instituted on condition that New York control the legal fees incident to the litigation; and that so long as New York did not discriminate against those asserting rights under the federal act such condition would be valid. Cf. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377. It does not appear, however, that New York has followed that course. The fact that New York has adopted measures designed to protect attorneys practicing in its courts does not demonstrate that New York has made its control over the fees a condition to the use of its tribunals. There is no such indication in the opinion of the New York Court of Appeals. Thus we cannot say that New York has provided conditions for entry into its courts which collide with a Congressional enactment. We can only assume therefore that the case is no different in principle from the one where a state grants to creditors attachments in aid of the collection of their claims. There can be no doubt that such liens could be nullified by supervening bankruptcy whether the creditor be lawyer or merchant.

But if it is assumed that New York might have refused to entertain such suits as were brought against the old management (cf. *Monaco* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56-59) it does not follow that it could take jurisdiction of them but fail to apply any federal law in which those claims might be found. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239. Where Congress has prescribed the rule to govern the compensation of those employed by the bankruptcy court, those claims are no less dependent on the federal rule because they are asserted as an incident to another suit. If the state court could disregard the federal rule in that situation, then any of the duties of administration which Congress has imposed on the bankruptcy court could be absorbed by the state tribunal. *Eau Claire National Bank* v. *Jackson*, *supra*. Congress has fixed the fees which various representatives or officers of the bankruptcy court may receive for their services. §§ 40, 48. Among these are the bankruptcy trustees. § 48 (c). As in the present case those trustees may at times choose to act as their own attorneys. But it would be novel doctrine indeed to hold that state courts could increase any maximum allowance which Congress might authorize bankruptcy trustees to receive from the

estate merely because the trustees rendered some of their services in state tribunals. Yet if Congress can protect bankruptcy estates by itself prescribing maximum fees for those representing or rendering service to the estate, it is not apparent why it may not reach the same result by delegating that authority to the bankrupcy court. Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of all fees as part of the plan has been entrusted to the bankruptcy court exclusively. The case is therefore controlled by the principle of *Hines* v. *Lowrey*, 305 U. S. 85. In that case we held that where an Act of Congress limited to ten dollars the fees for services in connection with veterans' War Risk Insurance claims, the New York court could not award a greater amount to an attorney representing a guardian of an insane veteran even where the guardian was appointed by the New York court. We reversed a judgment of the New York court granting the attorney $1500 for his services. The purpose of Congress to place the control of petitioners' fees in the bankruptcy court is no less clear than its purpose to limit the amount of fees in the *Hines* case. In each the federal rule is the supreme law of the land.

We only hold that the bankruptcy court has exclusive authority under Ch. X to fix the amount of allowances for fees. Whether the amount so fixed could be secured by a lien created by local law raises a question which we do not reach.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

Mr. Justice FRANKFURTER, concurring.

1. Since 1789, rights derived from federal law could be enforced in state courts unless Congress confined their enforcement to the federal courts. This has been so precisely for the same reason that rights created by the British Parliament or by the Legislature of Vermont could be enforced in the New York courts. Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—enables

See, for instance, Minnesota v. Jones, 109 U.S. 513, 520.

them to enforce rights no matter what the legislative source of the right may be.

2. In short, subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power, and the States are as free from control by Congress in establishing state systems for litigation as is Congress free from state control in establishing a federal system for litigation. The only limitation upon the freedom of a State to define the jurisdiction of its own courts is that implied by Article IV, Section 2 of the Constitution, whereby "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Constitution does not require New York to give jurisdiction to its courts against its will. But "If the State does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other States of the Union also would have a right to resort to it in cases of the same class". *Anglo-Am. Prov. Co. v. Davis Prov. Co. No. 1*, 191 U. S. 373, 474. The matter was well put by Judge Cuthbert Pound in connection with litigation under the Federal Employers' Liability Act in the state courts: "the State courts must make no hostile discrimination against litigants who come within the act in question; . . . they must treat litigants under the Federal act as other litigants are treated; . . . they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress." *Murnan v. Wabash Railway Co.*, 246 N. Y. 244, 247.

3. The upshot of the matter is that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction." *Claflin v. Houseman, Assignee*, 93 U. S. 130, 136-137. Whether a state court is "competent to decide rights of the like character and class", whether the particular litigation is to be tried by jury and, if so, how the

jury is to be composed, whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature—in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be—all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211. As it was put by Mr. Justice Story in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330-331, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself". Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every other litigant who seeks access to its courts.

4. Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employers' Liability Act, and after thorough canvass the matter was thus summarized by Mr. Justice Holmes in *Douglas* v. *New Haven R. Co.*, 279 U. S. 377, 387-388. "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."

5. The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court. It certainly has not done so by the Bankruptcy Act nor can any implication to that effect be derived from the Supremacy Clause of the Constitution. For the Supremacy Clause does not give greater supremacy to the Bankruptcy Act over the free scope of the States to determine what shall be litigated in their courts and under what

conditions, than it gives with reference to rights directly secured by the Constitution, such as those guaranteed by the Full Faith and Credit Clause, see *Anglo-Am. Prov. Co.* v. *Davis Prov. Co. No. 1, supra*, or with reference to the power exercised by Congress under the Commerce Clause, see *Minn. & St. Louis R. R.* v. *Bombolis, supra*.

6. The exercise of a right which Congress has not sought to exercise since 1789 and evidently has not exercised because of the constitutional relation of federal rights to their enforcement in state courts should not be read into Chapter X. c. 575, 52 Stat. 883, 11 U. S. C. § 501 *et seq.* We should hesitate long before we find that Congress has assumed the power to render unconstitutional state legislation by which access to a state court would be allowed to a litigant on no different terms than those which the State has prescribed for its own litigants to whom access to its courts is given in like cases. And certainly such a wholly novel doctrine of constitutional law should not be resorted to gratuitously when the case before us can be disposed of on the conclusive ground that the litigation conducted in the New York courts was conducted under an arrangement consonant with New York law, namely that the attorneys' fees were to be fixed not by the New York courts but by the Bankruptcy Court. See *Matter of Heinsheimer*, 214 N. Y. 361. Recognition that such is New York law and that therefore the remission of fee-fixing in this case to the Bankruptcy Court is not in conflict with that law appears from the opinion below: "as a matter of fact the retainer of these attorneys was subject to the condition that the amount of any fees would be fixed by the United States District Court." 290 N. Y. 468, 475. The disposition of this case requires neither the assumption made in the Court's opinion relating to New York law, nor the application given to Chapter X, both of which must be inescapable before we even reach the constitutional issue needlessly projected.

7. *Hines* v. *Lowrey*, 305 U. S. 85, does not touch this problem. That case involved § 500 of the World War Veterans' Act which limited to $10 the fee that may be allowed for services in pressing a claim before the United States Veterans' Bureau and made it a crime to charge more. A New York court granted a fee of $1500 for such services because the estate of the veteran was being administered by a committee appointed by the state court which had

appointed an attorney to press the claim before the Veterans' Bureau. Of course this Court held that a state court cannot sanction that which Congress has outlawed as a crime. The New York court in effect denied the authority of federal law to fix fees for litigation before a federal tribunal—a very different thing from denying to the State of New York the authority to fix fees for litigation in its own courts. The limitations in the *Hines* case fixed by Congress did not run counter to any requirement of New York law governing the conduct of suits in its courts. That case was not concerned with such a situation, and therefore could not possibly hold that, if New York had a policy for litigation in its courts contrary to that expressed by Congressional enactment, a federal right could be pursued in disregard of the conditions for entry into New York courts applicable to all other litigants. Congress has never said that it can subvert the declared policy of a State as to the manner in which, or the conditions under which, litigation in state courts should be conducted. The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress though of course state law may in words or by implication make the federal rule for conducting litigation the rule that should govern suits to enforce federal rights in the state courts. Surely it cannot be that should New York decide to regulate the public profession of the law by putting the determination of all attorneys' fees in charge of its courts, Congress could provide that actions thereafter brought in New York courts in the enforcement of federal rights shall not be subject to New York's fee system. I repeat, *Hines* v. *Lowery*, *supra*, gives no support whatever to a claim which was not involved in that case, which it did not consider, and which runs counter to the whole course of federal judiciary legislation and federal adjudication.

We ought not to go out of our way to embarrass consideration of such delicate questions in the working of our federal system whenever in the future they may call for decision by this Court.

Mr. Justice Jackson joins in this opinion.